1998

Pacific Development, L.C., a Limited Liability Company, and Otto Belvedere v. Eric Orton, dba Orton Excavation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PACIFIC DEVELOPMENT, L.C., a Limited Liability Company, and OTTO BELVEDERE, Plaintiffs, v. ERIC ORTON, dba ORTON EXCAVATION, Defendant.	Case No. 980148-CA Priority No. 15

BRIEF OF APPELLANT

Appeal from the Confirmation of Arbitrator's Award and Judgment of the Fourth Judicial District Court of Utah, Utah County, the Honorable Steven L. Hansen presiding.

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TABLE OF AUTHORITIES

CASES CITED

State Cases

Federal Cases

STATUTES CITED

COURT RULES CITED

None.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the arbitrator, by ruling on issues relating to Plat B and awarding damages based, at least in part, on work allegedly performed by Orton on Plat B, exceeded the authority granted to him by the parties' Agreement to Arbitrate. "Generally,

to find that an arbitrator has exceed his authority, a court must review the submission agreement and determine whether the arbitrator's award covers areas not contemplated by the submission agreement." *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 949 (Utah 1996). The "authority of the arbitrator springs from the agreement to arbitrate." *Id.* (citing *Swift Indus., Inc., v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972) and *Western Elec. Co. v. Communications Wkrs. Of Am.*, 450 F.Supp. 876, 881 (E.D.N.Y. 1978) ("The powers of an arbitrator are defined by agreement of the parties: the question they submit both establishes and limits the arbitrator's jurisdiction. It is the reviewing court's duty [under the exceeding authority test] to determine whether the arbitrator has acted within that jurisdiction.")); *see also* Utah Code Ann. § 78-31a-14(c). "The proper test under the exceeding authority ground is "'whether the arbitrator exceeded the powers delegated to him by the parties.'" *Id.* (citing *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.2d 1250, 1256 (7th Cir. 1994)). The district court's determination that the arbitrator did not exceed his authority is a conclusion of law, which is granted no deference and reviewed for correctness. *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246, 1251 (Utah 1994);

2. Whether the arbitrator, by ruling that Orton did not utilize too much material in the course of providing services on Plat C, manifestly disregarded well-established contract law concerning

the implied covenant of good faith and fair dealing. As a judicially created doctrine, the manifest disregard of the law doctrine stems from the exceeding authority statutory ground. *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996). "If arbitrators manifestly disregard the law in making their award, they can be said to have exceeded their authority." *Id.* The district court's determination that the arbitrator did not manifestly disregard the implied covenant of good faith and fair dealing is a conclusion of law, which is reviewed for correctness. *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246, 1251 (Utah 1994);

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant brief.

STATEMENT OF THE CASE

On September 20, 1995, Plaintiffs filed a Complaint in Fourth District Court against Defendant alleging, causes of action for Wrongful Lien, Slander of Title, Defamation of Character. On May 7, 1996, Defendant responded by filing his Answer, Counterclaim, and Third-Party Complaint. Thereafter, on May 17, 1996, Plaintiffs filed their Response to Counterclaim and Third-Party Complaint.

On June 9, 1997, Plaintiffs and Defendant, through their respective counsel of record, executed an Agreement to Arbitrate, in which the parties agreed that the arbitration would "focus" only on matters relating to Plat C. The arbitration was held on August 26-27, and September 10, 1997, after which the arbitrator issued an Interim Arbitration Award. Thereafter, Plaintiffs filed a Motion for Reconsideration. Shortly thereafter, Defendant filed his Opposition to the Motion for Reconsideration.

The arbitrator, on December 24, 1997, issued his Final Arbitration Award. On January 2, 1998, Defendant filed a Motion to Confirm Arbitrator's Award with the Fourth District Court, the Honorable Judge Steven L. Hansen presiding. Thereafter, on January 22, 1998, Plaintiffs filed a Motion to Vacate or Modify Arbitration Award together with a supporting Memorandum.

On February 17, 1998, the district court held a hearing on the Motion to Vacate or Modify Arbitration Award, after which, it confirmed the arbitrator's Final Arbitration Award. On February 19, 1998, the district court signed the Confirmation of Arbitrator's Award and Judgment, which was entered that same day.

On March 23, 1998, Plaintiffs filed Notice of Appeal, thereby appealing to the Utah Supreme Court from the Confirmation of Arbitrator's Award and Judgment. Defendant, on or about June 8, 1998, filed a Motion for Summary Disposition. Plaintiffs responded

by filing a Response in Opposition to Appellee's Motion for Summary Disposition.

On July 15, 1998, the district court signed an Order Setting Aside Judgment Against Plaintiff Otto Belvedere. By way of Order signed on July 27, 1998, the Utah Supreme Court "deferred ruling on appellee's motion for summary disposition until further consideration . . . ." On August 7, 1998, the Utah Supreme Court poured-over the instant appeal to this Court for disposition.

On October 30, 1998, Plaintiff Otto Belvedere filed a Stipulated Motion of Appellant Otto Belvedere to Voluntarily Dismiss Otto Belvedere From Appeal. Thereafter, on November 3, 1998, this Court, by way of Order Dismissing Appellant Otto Belvedere From Appeal, dismissed Otto Belvedere, solely, from the instant appeal.

STATEMENT OF FACTS

1. On September 20, 1995, Plaintiffs, Pacific Development, L.C. (Pacific), and Otto Belvedere, through counsel, filed a Complaint in Fourth District Court against Defendant, Eric Orton, d/b/a Eric Orton Excavation, alleging causes of action for Wrongful Lien, Slander of Title, Defamation of Character (R. 1-7, Complaint);

2. On May 7, 1996, Defendant, through counsel, filed his Answer, Counterclaim, and Third-Party Complaint (R. 69-80, Answer, Counterclaim and Third-Party Complaint);

3. On May 17, 1996, Plaintiffs, through counsel, filed their Response to Counterclaim and Third-Party Complaint (R. 81-86, Response to Counterclaim and Third-Party Complaint);

4. On June 9, 1997, Plaintiffs and Defendant, through their respective counsel of record, executed an Agreement to Arbitrate, in which the parties agreed that the arbitration would "focus" only on matters relating to Plat C, inasmuch as all other matters had been resolved (R. 145, Agreement to Arbitrate, a true and correct copy of which is attached as Exhibit A to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Vacate or Modify Arbitration Award; *see also* Finding of Fact);

5. After the arbitration held on August 26-27, and September 10, 1997, the arbitrator, on November 7, 1997, issued his Interim Arbitration Award (R. 187-92, Interim Arbitration Award). In that Interim Arbitration Award, the arbitrator, in direct contravention to the plain language of the parties' Arbitration Agreement, proceeded to rule on issues involving Plat B (*See* R. 187-92, Interim Arbitration Award);

6. Thereafter, Plaintiffs' counsel filed a Motion for Reconsideration, objecting that the arbitrator lacked authority to rule on Plat B issues and requesting that the arbitrator reconsider its ruling in light of the well-established implied duty of good faith and fair dealing that Defendant breached in the course of using over three times the amount of fill material reasonably and fairly

necessary to complete Plat C (*See* R. 181-85, Motion for Reconsideration);

7. Shortly thereafter, Defendant filed his Opposition to the Motion for Reconsideration (*See* R. 177-80, Opposition to Motion for Reconsideration);

8. On December 24, 1997, the arbitrator issued his Final Arbitration Award, which states:

> Pacific's Motion for Reconsideration is denied. The Arbitrator heard the arguments during the course of the proceeding that are being reargued by Pacific. Pacific's argument is based largely upon its argument that Orton had within its scope of work the obligation to perform the rough grading of the roadway. The Arbitrator specifically found that the contract did not require that work to be done by Orton. Orton obviously has a duty of good faith and fair dealing with Pacific. The Arbitrator, however, further found that Pacific did not [sic] its burden of proof of its allegation that Orton wasted material in Plat C.

(R. 138, Final Arbitration Award, ¶25). By way of the Final Arbitration Award, the arbitrator awarded a net amount to Defendant of $66,440.24, attorney fees in the amount of $17,500, and costs in the amount of $733.50 (*Id.* at R. 166-67, ¶¶23, 28-29);

9. January 2, 1998, Defendant filed a Motion to Confirm Arbitrator's Award with the Fourth District Court, the Honorable Judge Steven L. Hansen presiding (R. 124-28, Motion to Confirm Arbitrator's Award);

10. On January 22, 1998, Plaintiffs filed a Motion to Vacate or Modify Arbitration Award together with a supporting Memorandum (R.

135-36, Motion to Vacate or Modify Arbitration Award; R. 137-56, Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Vacate or Modify Arbitration Award);

11. On February 17, 1998, the district court held a hearing on the Motion to Vacate or Modify Arbitration Award, after which, without taking the matter under advisement and without making findings of fact, confirmed the arbitrator's Final Arbitration Award (*See* Transcript of Hearing on Motion to Vacate or Modify Arbitration Award, pp. 29-30);

12. On February 19, 1998, the district court signed the Confirmation of Arbitrator's Award and Judgment, which was entered that same day (R. 230-33, Confirmation of Arbitrator's Award and Judgment);

13. On March 23, 1998, Plaintiffs filed Notice of Appeal, thereby appealing to the Utah Supreme Court from the Confirmation of Arbitrator's Award and Judgment (R. 270-72, Notice of Appeal);

14. On or about June 8, 1998, Defendant, through counsel, filed a Motion for Summary Disposition together with a supporting Memorandum. Plaintiffs responded by filing a Response in Opposition to Appellee's Motion for Summary Disposition;

15. On July 15, 1998, the district court signed an Order Setting Aside Judgment Against Plaintiff Otto Belvedere;

16. By way of Order signed on July 27, 1998, the Utah Supreme Court "deferred ruling on appellee's motion for summary disposition until further consideration . . . .";

17. On August 7, 1998, the Utah Supreme Court poured-over the instant appeal to this Court for disposition;

18. On October 30, 1998, Plaintiff Otto Belvedere filed a Stipulated Motion of Appellant Otto Belvedere to Voluntarily Dismiss Otto Belvedere From Appeal;

19. Thereafter, on November 3, 1998, this Court, by way of Order Dismissing Appellant Otto Belvedere From Appeal, dismissed Otto Belvedere, solely, from the instant appeal.

SUMMARY OF ARGUMENTS

1. The arbitrator, by ruling on issues relating to Plat B and awarding damages based, at least in part, on work allegedly performed by Orton on Plat B, exceeded the authority explicitly granted to him by the parties in their agreement to arbitrate. Notwithstanding the parties Agreement to Arbitrate, the arbitrator, throughout both the Interim and the Final Arbitration Award, ruled on matters outside of that granted to him by the parties by ruling on matters involving Plat B. By so doing, the arbitrator exceeded the authority explicitly granted to him by the parties in the Agreement to Arbitrate;

2. The arbitrator, by ruling that Orton did not utilize too much fill material in the course of providing services on Plat C, manifestly disregarded well-established contract law concerning the implied covenant of good faith and fair dealing. In the course of so ruling, the arbitrator not only manifestly disregarded well-established principles concerning the implied covenant of good faith and fair dealing, it unjustifiably added a new term to the unit contract entered into between the parties by requiring that Pacific hire and have an employee, *i.e.*, an engineer, to monitor the amount of fill material utilized by Orton in the course of completing Plat C.

ARGUMENTS

I. THE ARBITRATOR, BY RULING ON ISSUES RELATING TO PLAT B AND AWARDING DAMAGES BASED, AT LEAST IN PART, ON WORK ALLEGEDLY PERFORMED BY ORTON ON PLAT B, EXCEEDED THE AUTHORITY EXPLICITLY GRANTED TO HIM BY THE PARTIES IN THEIR AGREEMENT TO ARBITRATE.

According to Utah Code Ann. § 78-31a-14(c) and (d), "a court may vacate an arbitration award *if it appears that . . . the arbitrators exceeded their powers* . . . or otherwise conducted the hearing to the substantial prejudice of the rights of a party . . . ." Utah Code Ann. § 78-31a-15(1)(b) provides further that "a court *shall* modify or correct the award *if it appears . . . the arbitrator's award is based on a matter not submitted to them* . . . ." (Emphasis added). *See also Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941,

949-50 (Utah 1996) (discussing the statutory ground of exceeding authority for setting aside arbitration award).

"The proper test under the exceeding authority ground is "'whether the arbitrator exceeded the powers delegated to him by the parties.'" *Id.* (citing *Eljer Manuf., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994)). "'It is . . . fundamental that the authority of the arbitrator springs from the agreement to arbitrate.'" *Id.* (quoting *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972); *Western Elec. Co. v. Communications Wkrs. of Am.*, 450 F.Supp. 876, 881 (E.D.N.Y. 1978) ("The powers of the arbitrator are defined by agreement of the parties . . . It is the reviewing court's duty [under the exceeding authority test] to determine whether the arbitrator has acted within that jurisdiction.") (citations omitted). Thus, "while courts do not sit to determine whether the arbitrator has resolved a dispute as they would have, the court must determine whether an arbitrator has properly fulfilled his mandate." *Western Elec. Co.*, 450 F. Supp. at 881-82 (citations omitted).

In the instant case, the parties, on June 9, 1997, executed the Agreement to Arbitrate (*See* R. 145, Agreement to Arbitrate, a true and correct copy of which is attached hereto as Addendum A). The Agreement explicitly states, in relevant part, that "the arbitration will focus on the remaining issues of the dispute, those which relate

to Plat C, thereby resolving all remaining issues in the case." (*Id.*).

Notwithstanding the parties Agreement, the arbitrator, throughout both the Interim and the Final Arbitration Award, ruled on matters outside of that granted to him by the parties by ruling on matters involving Plat B (*See* R. 187-92, Interim Arbitration Award; R. 137-43, Final Arbitration Award). By so doing, the arbitrator exceeded the authority explicitly granted to him by the parties in the Agreement to Arbitrate.

II. THE ARBITRATOR, BY RULING THAT ORTON DID NOT UTILIZE TOO MUCH FILL MATERIAL IN THE COURSE OF PROVIDING SERVICES ON PLAT C, MANIFESTLY DISREGARDED WELL-ESTABLISHED CONTRACT LAW CONCERNING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The manifest disregard of the law ground for overturning an arbitration award, as a judicially created doctrine, stems from the exceeding authority statutory ground. *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 951 (Utah 1996) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187 (1953) ("[T]he interpretations of the law by the arbitrators[,] *in contrast to manifest disregard*[,] are not subject . . . to judicial review for error . . . ." (emphasis added)); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2nd Cir 1960).[1] "If arbitrators manifestly disregard the law in making their

[1]In *Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996), the Utah Supreme Court, although analyzing the manifest

award, they can be said to have exceeded their authority."[2] *Id.*; *see also Eljer Manuf., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (stating that the arbitrator's decision will be set aside "if in reaching his result, the arbitrator deliberately disregards what he knows to be the law.") (citing *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Jenkins v. Prudential-Bache Sec. Inc.*, 847 F.2d 631, 634 (10th Cir. 1988) (characterizing the "manifest disregard" standard as "willful inattentiveness to the governing law."); and *Jeppson v. Piper, Jaffray & Hopwood, Inc.*, 879 F.Supp. 1130, 1133 ((D. Utah 1995). According to the United States Court of Appeals for the Second Circuit in *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930 (2nd Cir. 1986),

> Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. *Drayer v. Karsner, 572 F.2d 348, 352 (2d Cir.), cert. denied,* 436 U.S. 948, 98 S.Ct. 2855 (1978); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974). The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies

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disregard ground because it was raised by Buzas Baseball and relied upon by the trial court below, expressly reserved the issue of whether this ground is recognized in Utah inasmuch as the case was decided on other grounds. *Id.* at 951 n.8, 949. As a result, this issue is a matter of first impression.

[2]The district court's determination that the arbitrator did not manifestly disregard the implied covenant of good faith and fair dealing is a conclusion of law, which this Court reviews for correctness. *DeVore v. IHC Hosps., Inc.*, 884 P.2d 1246, 1251 (Utah 1994).

> that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. *Bell Aerospace Company Division of Textron, Inc. v. Local 516*, 356 F.Supp. 354, 356 (W.D.N.Y. 1973, *rev'd on other grounds*, 500 F.2d 921 (2d Cir. 1974).

Id. at 933.

In this case, the arbitrator, in his Interim Arbitration Award, ruled as follows concerning the claim that Plaintiff is due a credit or offset for Orton utilizing too much fill material on Plat C:

> Pacific claims that it is entitled to a credit or offset to the claims of Orton alleging that Orton used too much imported material. The problem appears to be inherent to the unit price contract that was entered into by the parties. Unit price contracts have advantages and disadvantages. Pacific properly points out that under a unit price contract Orton has no incentive to be judicious in its use of material being paid for by the unit. On the other hand, Pacific only pays for what is actually used. Pacific, however, entered into the unit price type of contract. If Pacific wanted to exercise better control over the useage [sic] of material its [sic] should have had a representative (typically an engineer) on site to see that material was being properly used. During the performance of much of the work in Plat B Pacific had such a representative on site. During the performance of work on Plat C Pacific had no such representative on site. The Arbitrator does not find that the evidence supports a finding that Orton wasted material. There was evidence presented by Pacific that more material was used in Plat C than maybe Pacific thought should be used. Pacific, however, did not meet its burden of proof on that issue. The computations by Fred Clark were general in nature omitting some lengths of pipe installation, [sic] assumed that Orton was responsible to cut the road for rough grading, etc.

(R. 187-88, Interim Arbitration Award, ¶22). Upon receiving and reviewing the arbitrator's Interim Arbitration Award, Plaintiff

submitted a Motion for Reconsideration to the arbitrator, arguing that Orton breached the implied duty of good faith and fair dealing by utilizing over three times the amount of fill material reasonably required to complete Plat C (*See* R. 184, Motion for Reconsideration). In the course of so arguing, Plaintiff cited to various Utah cases setting forth and discussing Utah law on the implied duty of good faith and fair dealing (*See id.*). Notwithstanding, the arbitrator thereafter issued his Final Arbitration Award, which included the identical paragraph 22 as that previously set forth by the arbitrator in his proposed Interim Arbitration Award (R. 140, Final Arbitration Award, ¶22). The arbitrator, however, included the following additional paragraph in its Final Arbitration Award concerning the issue as to Orton utilizing too much fill material:

> Pacific's Motion for Reconsideration is denied. The Arbitrator heard the arguments during the course of the proceeding that are being reargued by Pacific. Pacific's argument is based largely upon its argument that Orton had within its scope of work the obligation to perform the rough grading of the roadway. The Arbitrator specifically found that the contract did not require that work to be done by Orton. Orton obviously has a duty of good faith and fair dealing with Pacific. The Arbitrator, however, further found that Pacific did not [sic] its burden of proof of its allegation that Orton wasted material in Plat C.

(*See id.* at R. 138, ¶25).

By ruling in paragraph 22 of the Final Arbitration Award that the problem "appears to be inherent" in the unit price contract entered into by the parties, and that if "Pacific wanted to exercise

better control over the useage [sic] of the material its [sic] should have had a representative (typically an engineer) on site to see that material was being property used", the arbitrator manifestly disregarded the well-established contract principle, as extensively set forth in Utah case law, that each party to a contract has an implied covenant of good faith and fair dealing with the other party to the contract. *See St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1994). By virtue of this covenant, "each party impliedly promises that he will not intentionally or purposely do anything that will destroy or injure the other party's right to receive the fruits of the contract." *Id.* (citing *Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981); *Ferris v. Jennings*, 595 P.2d 857 (Utah 1979)); *see also Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 291 (Utah Ct. App. 1994) (citing *St. Benedict's Dev.*, 811 P.2d at 199-200; *Andalex Resources, Inc.*, 871 P.2d 1041, 1047-48 (Utah Ct. App. 1994)). "A violation of the covenant gives rise to a claim for breach of contract." *Id.* The covenant of good faith and fair dealing is especially applicable where, as in the instant case, one party under the contract grants the other party discretion to determine such terms as quantity, price, or time of performance. *See, e.g., Cook v. Zions First National Bank*, 919 P.2d 56 (Utah Ct. App. 1996). The arbitrator's deliberate disregard of the law concerning the covenant of good faith and fair dealing is further demonstrated by his acknowledgment that

the parties entered into a unit price contract and his detailed discussion of the inherent "problems" with such contracts. In direct contravention to this acknowledgment and discussion, the arbitrator then ruled that "[i]f Pacific wanted to exercise better control over the useage [sic] of material its [sic] should have had a representative (typically an engineer) on site to see that material was being property used." By utilizing this as the basis for its ruling, the arbitrator not only manifestly disregarded the principles of law regarding the implied covenant of good faith and fair, but it implied a new term in the unit contract entered into by the parties by requiring that Pacific in fact hire an employee, *i.e.*, an engineer, to monitor the fill material utilized by Orton in the course of completing Plat C. *See Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982) (holding that "this court will not rewrite a contract to supply terms which the parties omitted."). By requiring this, the arbitrator essentially relieved Orton of the duty to act in good faith and fairly with Pacific.

CONCLUSION

Based on the foregoing, Plaintiff, Pacific Development, L.C., respectfully asks that this Court reverse the district court's Order Confirming the Arbitrator's Award and remand the case for a determination and award of attorney fees incurred on appeal as well

as the entry of any orders or proceedings consistent with this Court's instructions set forth in its Opinion.

STATEMENT REGARDING METHOD OF DISPOSITION

Counsel for Plaintiff / Appellant requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value in future cases due to the significant issues in the instant appeal dealing with arbitrator exceeding his or her authority as granted by the agreement by parties to arbitrate. Another reason for the opinion in the instant appeal should be by published opinion is that the issue involving the manifest disregard of well-established law is an issue of first impression under Utah case law. The aforementioned issues concern matters that are of continuing public interest and which, based on the facts of the instant appeal, involve issues requiring further development in the area of law dealing with the review of arbitration awards, which would benefit both the bar and public, respectively.

RESPECTFULLY SUBMITTED this 3rd day of November, 1998.

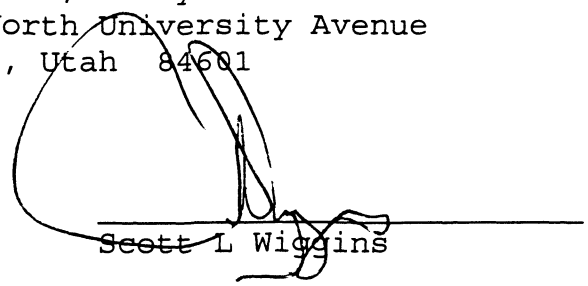
ARNOLD & WIGGINS, P.C.

Scott L. Wiggins
Attorneys for Appellant

CERTIFICATE OF MAILING

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT**, postage prepaid, to the following, on this 23rd day of November, 1998:

Mr. Richard D. Bradford
Bradford, Brady & Johnson
389 North University Avenue
Provo, Utah 84601



Scott L Wiggins

ADDENDA

Addendum A: Agreement to Arbitrate
Addendum B: Interim Arbitration Award
Addendum C: Final Arbitration Award
Addendum D: Confirmation of Arbitrator's Award and Judgment

Addendum A

AGREEMENT TO ARBITRATE

June 9, 1997

The parties to this Agreement hereby submit the following dispute to binding arbitration, with Robert F. Babcock to serve as the Arbitrator. The parties agree to submit to arbitration all remaining issues arising out of the dispute over a Mechanics' Lien filed against Riderwood Village, Plats B & C, the foreclosure of which is the subject of the Counterclaim in the case styled PACIFIC DEVELOPMENT, et al. v ORTON EXCAVATION, et al. and filed as Case No. 450500576 with the Fourth District Court in Provo, Utah.

Part of the original Complaint concerning this matter was a Defamation Claim made by Otto Belvedere. The parties stipulate that said Defamation Claim will not be a subject of this arbitration since the Plaintiff has decided not to pursue it. Further, they acknowledge that the issues relating to the above-referenced Plat B of Riderwood Village have been resolved, and that, therefore, the arbitration will focus on the remaining issues of the dispute, those which relate to Plat C, thereby resolving all remaining issues in the case.

The parties agree to arbitrate this matter on ~~July 1 and July 2~~ July 17 & 18, 1997 at the offices of WALSTAD & BABCOCK, 57 West South Temple, 8th Floor, Salt Lake City, Utah. (Rescheduled for Aug. 12 & 1

The parties agree that they will abide by the Award rendered by the Arbitrator and that a judgment may be entered upon the Award in a court of competent jurisdiction.

The parties agree to compensate the Arbitrator at the hourly rate of $135/hour for time spent in the hearing and in deliberations. The parties each agree to deposit with the Arbitrator prior to the hearing the sum of One Thousand Three Hundred Fifty Dollars ($1,350.00).

PACIFIC DEVELOPMENT

By: _____
Mark E. Arnold
Attorney for Otto Belvedere and
Pacific Development

ORTON EXCAVATION

By: _____
Richard D. Bradford
Attorney ~~for~~ Jerry Orton and
Orton Excavation

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Addendum B

INTERIM ARBITRATION AWARD

This matter came for hearing before the Arbitrator, Robert F. Babcock, on August 26 & 27 and September 10, 1997. The parties, Orton Excavation ("Orton") and Pacific Development ("Pacific"), together with their respective in counsel, were present for each of the three days of the hearing. The parties presented evidence, both documentary and by testimony of witnesses. The parties made argument during the course of the proceeding and through briefs after the close of the evidence. The arbitrator has deliberated over the evidence and the briefs of counsel. Based upon the evidence the Arbitrator makes the following findings of fact:

FINDINGS OF FACT

1. The Arbitrator initially admonishes the parties, as stated during the proceeding, that if they had communicated more clearly during the performance of the work many of the disagreements that are before the Arbitrator would likely have been resolved during the performance of the work. Confirming letters, memos, faxes, etc. about the scope of work. extras, pricing, etc. would have served both parties well.

2. The contract between the parties provided for arbitration of the dispute. Further, the parties agreed to submit the matter to arbitration for resolution.

3. The parties entered into a contract dated April 10, 1994. Pursuant to the contract, Orton was to perform certain work for Pacific on the Riderwood Village Subdivision in Utah County. The work was outlined in two attachments to the contract the first dated April 4, 1994 and the second dated October 10, 1994 which superceded the first. The work was grouped under three headings Sewer, Water and Storm Drain. The work was to be paid for according to various unit prices based upon actual quantities of work performed. Notably the October 10, 1994 addendum stated "Quantities subject to on-site measuring and delivery invoices and/or trucking slips, after installation."

4. Work was performed by Orton for Pacific on both Plat B and Plat C.

5. It was stipulated that the sum of the extended unit price work amounted to the sum of $419,843.44.

6. It was stipulated that Orton supplied bedding materials that amounted to $156,146.82. The figure was in the reconciliation of both parties.

7. It was stipulated that an authorized representative of Pacific signed change orders for extra work performed by Orton on Plat B in the sum of $15,907.85. The Arbitrator notes that five of the thirteen approved extras in Plat B involved the stripping of material from roadways and the cutting of material in roadways.

8. Orton asserted claims for additional extra work performed in Plat B. Item #15 was stipulated to in the sum of $977.

9. Orton asserted claims for additional extra work performed in Plat C. Item #3 was stipulated to in the sum of $1320 by acknowledging that payment was made for this item. Item #6 in the sum of $1398.71 was similarly stipulated to. Item #12 was also stipulated to in the sum of $7560.00. The total of stipulated amounts is $10,278.71.

10. Even though Pacific acknowledged that it "paid" for these items (outlined in paragraphs 5, 6 and 7), in its reconciliation Pacific failed to include the value of the agreed to items of $27,163.56 within the reconciliation.

11. It was stipulated that the net sum of $567,934 (taking into account amounts paid back by Orton to Pacific) was paid by Pacific to Orton or to suppliers or subcontractors of Orton. In addition, two checks totaling $4,500 were produced for the first time at the hearing which were agreed had been paid by Pacific to Orton. The total stipulated net payments amounted to $572,433.

12. Taking into account the above mentioned stipulated items, the net due Orton by Pacific, before addressing the contested items is $30,720.82.

13. On the disputed extras in Plat B the arbitrator finds as follows: On item #3 the evidence supports the position of Orton in the sum of $990. On item #5 the evidence supports the position of Orton in the sum of $1412.50. On item #6 the evidence supports the position of Orton in the sum of $1409.44. On item #7 the evidence does not support the position of Orton. The contract does not have a differing site condition clause. The risk of differing subsurface conditions was on Orton. On item #8 the evidence supports the position of Orton in the sum of $1031.31. On item #9 the evidence supports the position of Orton in the sum of $2580.50. On item #10 the evidence supports the position of Orton in the sum of $220. On item #11 the evidence supports the position of Orton in the sum of $2627. On item #14 Orton failed in its burden of proof. Orton is awarded the sum of $10,270.75 on the disputed extras in Plat B.

14. On the disputed extras in Plat C the arbitrator finds as follows: On item #1 the evidence supports the position of Orton that additional material was moved. The price seems high to the arbitrator. The sum of $6000 is awarded. On item #2 the evidence supports the position of Orton in the sum of $1055.50. On item #4 the evidence supports the position of Orton in the sum of $1755. On item #5 the evidence supports the position of Orton in the sum of $112.83. On item #7 the evidence partially supports the position of Orton but also that some of the problem was caused by Orton's own errors in setting the boxes to the incorrect elevation. Orton is awarded the sum of $1000. On item #10 the evidence supports the position of Pacific that Orton should not have expected that the storm sewer

would not have been installed. The evidence supported the balance of Orton's claim in the sum of $6,440. On item #13 the evidence supports the position of Orton but only to the sum of $2000. Orton is awarded the sum of $16,362.83 on the disputed extras in Plat C.

15. Of the payments made by Pacific to Mountainland, $9,922.50 were credited to finance charges and not for materials. Since payments were being made by Pacific, the failure to make timely payments was a risk borne by Pacific and not Orton. The sum of $9,922.50 should not be charged against Orton.

16. Orton asserted a claim for a credit for Mountainland invoices not chargeable to Orton that should be credited back. In its post hearing brief, Orton properly acknowledged that the evidence did not support the claim in general. The Arbitrator finds that since the items were billed to Orton on a regular basis, that Orton had the responsibility to review the bills on a timely basis and bring concerns about differences in pricing to Mountainland at that time and to Pacific before payments were made. The Arbitrator finds that Orton, however, did sustain its burden of proof on items 10 and 11 in the sum of $362.83. The Arbitrator also awards to Orton the cause of action, if any exists, against Mountainland to try to recover any inappropriate overcharges by Mountainland on the listed invoices.

17. Orton asserted a claim for a credit for materials charged by Mountainland to Orton paid for by Pacific. Orton fails in its proof. The evidence was that Orton did the ordering of the materials, received the materials on site and had control of the materials at least until the time that Orton finished its work. If materials were in fact left on site Orton should have made some type of inventory of the same and had it acknowledged by Pacific. Orton bears the risk of loss of material under the circumstances.

18. Orton claims that it is entitled to a credit for overcharges made by Westroc on materials delivered to the project. The parties again should have been communicating about the invoices. Pacific should have been reviewing the invoices on a regular basis with Orton before making payment on the invoices. Orton should have been asking about what was being billed and charged against their contract. The resulting situation is problematic. The Arbitrator awards to Orton the cause of action, if any exists, to pursue Westroc to recover any inappropriate overcharges by Westroc currently asserted to be in the range of $7,000. Orton knows what was quoted by Westroc, about the alleged substitution of materials by Westroc for its convenience, and now what was charged. Pacific is ordered to cooperate with Orton as necessary for Orton to pursue this claim against Westroc, if it so chooses.

19. Orton claims that it is entitled to a loss of equity in its equipment due to the failure of Pacific to timely make payments for sums due. The loss of equity in equipment is clearly a consequential damage claim. The law allows for consequential damages only if they were reasonably foreseeable at the time of entering into the contract. The damages are

not recoverable if they were not reasonably foreseeable at the time of contracting but were later reasonably foreseeable at the time of the breach of the contract. At the time of entering the contract Orton was only leasing the equipment. During the performance of the contract, Orton exercised its option to purchase the equipment. The claim of the loss of equity in purchased equipment was not reasonably foreseeable at the time of entering into the contract. Orton is therefore not entitled to recover on this claim. The claim is further undermined by the unusually aggressive and unreasonable actions taken by the lender in repossessing and selling the equipment in a commercially unreasonable fashion. The claim is also undermined by Orton's failure to protect its position in bidding at the sale or otherwise mitigating its damages by seeking a stay of the sale or legally challenging the commercially reasonableness of the sale.

20. Pacific is entitled to a deduction of $1200 for amounts paid to Gemini Concrete for making corrections to manholes that were set by Orton at an incorrect grade.

21. Pacific claims that it is entitled to a credit or offset against the claims of Orton on the basis that Orton should have performed, as part of its contract, the work of rough grading of the roadways. The Arbitrator finds that Pacific failed to meet the burden of proof on this issue. To the contrary, the evidence supports Orton's position that rough grading was not included in the contract between Pacific and Orton. The best evidence on this point was the fact that five signed change orders on Plat B were to compensate Orton "as an extra" for stripping and grading work. The scope of the unit prices do not lend themselves to an interpretation that would indicate that grading work was included in any of the unit items. It would not be the norm in the industry to include rough grading in the unit items unless specifically indicated. While there was testimony to that effect from Pacific the Arbitrator cannot find that Pacific met its burden of proof. The Arbitrator notes that Pacific was not entirely consistent its position as to payment for cutting the roadways to rough grade. On the one hand, Pacific wanted the cutting of the roadways to be ancillary to the stated unit price items of work and not to be paid separately. On the other hand, Pacific indicated that Orton was to be paid $1.50/yd for the cutting of the material. Pacific is not entitled to an offset for payments to Carnesecca or Christensen for rough grading work since that work was not part of the Pacific - Orton contract.

22. Pacific claims that it is entitled to a credit or offset to the claims of Orton alleging that Orton used too much imported material. The problem appears to be inherent to the unit price contract that was entered into by the parties. Unit price contracts have advantages and disadvantages. Pacific properly points out that under a unit price contract Orton has no incentive to be judicious in its use of material being paid for by the unit. On the other hand, Pacific only pays for what is actually used. Pacific, however, entered into the unit price type of contract. If Pacific wanted to exercise better control over the useage of material its should have had a representative (typically an engineer) on site to see that material was being properly used. During the performance of much of the work in Plat B Pacific had such a representative on site. During the performance of work on Plat C

Pacific had no such representative on site. The Arbitrator does not find that the evidence supports a finding that Orton wasted material. There was evidence presented by Pacific that more material was used in Plat C than maybe Pacific thought should have been used. Pacific, however, did not meet its burden of proof on that issue. The computations by Fred Clark were general in nature omitting some lengths of pipe installation, assumed that Orton was responsible to cut the road for rough grading, etc.

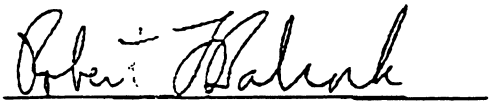
The award is summarized as follows:

Extended unit price work	$419,843.44
Bedding materials	$156,146.82
Signed change orders on Plat B	$15,907.85
Stipulated extra work in Plat B	$977.00
Award on disputed extra work in Plat B	$10,270.75
Stipulated extra work in Plat C	$10,278.71
Award on disputed extra work in Plat C	$16,363.33
Total of Work Performed by Orton	$629,787.90
Credits:	
Payments to Orton	($572,432.99)
Credit for repairs to manholes by Gemini	($1,200.00)
Total credits due Pacific	($573,632.99)
Other Adjustments:	
Add back finance charges paid to Mountainland	$9,922.50
Add back for materials used on Pacific residences	$362.83
Net amount due Orton	$66,440.24

23. Orton is entitled to interest on the unpaid amounts at the statutory rate of ten percent per annum. The sole reference to 24% interest is found on one change order signed by the representative of Pacific. That single invoice is insufficient to justify an award of interest higher than the statutory rate of ten percent per annum on all of the claims. Interest shall accrue as of May 15, 1995 and shall run until the award is paid.

24. Orton is the prevailing party in this arbitration. Orton prevailed, but obviously not entirely. Orton's counsel is requested to submit an affidavit of attorneys fees and costs within ten days of the date of this Interim Award. Pacific shall have ten days to file an objection to the request for attorneys fees. Orton shall have five days to file a response to the objections filed by Pacific. The arbitrator will then issue a Final Award resolving the issue of attorneys and costs.

Dated this 7th day of November, 1997



Robert F. Babcock, Arbitrator

Addendum C

FINAL ARBITRATION AWARD

This matter came for hearing before the Arbitrator, Robert F. Babcock, on August 26 & 27 and September 10, 1997. The parties, Orton Excavation ("Orton") and Pacific Development ("Pacific"), together with their respective in counsel, were present for each of the three days of the hearing. The parties presented evidence, both documentary and by testimony of witnesses. The parties made argument during the course of the proceeding and through briefs after the close of the evidence. The arbitrator deliberated over the evidence and the briefs of counsel. Based upon the evidence the Arbitrator made the following findings of fact in his Interim Arbitration Award:

FINDINGS OF FACT

1. The Arbitrator initially admonishes the parties, as stated during the proceeding, that if they had communicated more clearly during the performance of the work many of the disagreements that are before the Arbitrator would likely have been resolved during the performance of the work. Confirming letters, memos, faxes, etc. about the scope of work, extras, pricing, etc. would have served both parties well.

2. The contract between the parties provided for arbitration of the dispute. Further, the parties agreed to submit the matter to arbitration for resolution.

3. The parties entered into a contract dated April 10, 1994. Pursuant to the contract, Orton was to perform certain work for Pacific on the Riderwood Village Subdivision in Utah County. The work was outlined in two attachments to the contract the first dated April 4, 1994 and the second dated October 10, 1994 which superceded the first. The work was grouped under three headings Sewer, Water and Storm Drain. The work was to be paid for according to various unit prices based upon actual quantities of work performed. Notably the October 10, 1994 addendum stated "Quantities subject to on-site measuring and delivery invoices and/or trucking slips, after installation."

4. Work was performed by Orton for Pacific on both Plat B and Plat C.

5. It was stipulated that the sum of the extended unit price work amounted to the sum of $419,843.44.

6. It was stipulated that Orton supplied bedding materials that amounted to $156,146.82. The figure was in the reconciliation of both parties.

7. It was stipulated that an authorized representative of Pacific signed change orders for extra work performed by Orton on Plat B in the sum of $15,907.85. The Arbitrator notes

that five of the thirteen approved extras in Plat B involved the stripping of material from roadways and the cutting of material in roadways.

8. *Orton asserted claims for additional extra work performed in Plat B. Item #15 was* stipulated to in the sum of $977.

9. Orton asserted claims for additional extra work performed in Plat C. Item #3 was stipulated to in the sum of $1320 by acknowledging that payment was made for this item. Item #6 in the sum of $1398.71 was similarly stipulated to. Item #12 was also stipulated to in the sum of $7560.00. The total of stipulated amounts is $10,278.71.

10. Even though Pacific acknowledged that it "paid" for these items (outlined in paragraphs 5, 6 and 7), in its reconciliation Pacific failed to include the value of the agreed to items of $27,163.56 within the reconciliation.

11. It was stipulated that the net sum of $567,934 (taking into account amounts paid back by Orton to Pacific) was paid by Pacific to Orton or to suppliers or subcontractors of Orton. In addition, two checks totaling $4,500 were produced for the first time at the hearing which were agreed had been paid by Pacific to Orton. The total stipulated net payments amounted to $572,433.

12. Taking into account the above mentioned stipulated items, the net due Orton by Pacific, before addressing the contested items is $30,720.82.

13. On the disputed extras in Plat B the arbitrator finds as follows: On item #3 the evidence supports the position of Orton in the sum of $990. On item #5 the evidence supports the position of Orton in the sum of $1412.50. On item #6 the evidence supports the position of Orton in the sum of $1409.44. On item #7 the evidence does not support the position of Orton. The contract does not have a differing site condition clause. The risk of differing subsurface conditions was on Orton. On item #8 the evidence supports the position of Orton in the sum of $1031.31. On item #9 the evidence supports the position of Orton in the sum of $2580.50. On item #10 the evidence supports the position of Orton in the sum of $220. On item #11 the evidence supports the position of Orton in the sum of $2627. On item #14 Orton failed in its burden of proof. Orton is awarded the sum of $10,270.15 on the disputed extras in Plat B.

14. On the disputed extras in Plat C the arbitrator finds as follows: On item #1 the evidence supports the position of Orton that additional material was moved. The price seems high to the arbitrator. The sum of $6000 is awarded. On item #2 the evidence supports the position of Orton in the sum of $1055.50. On item #4 the evidence supports the position of Orton in the sum of $1755. On item #5 the evidence supports the position of Orton in the sum of $112.83. On item #7 the evidence partially supports the position of Orton but also that some of the problem was caused by Orton's own errors in setting the boxes to

the incorrect elevation. Orton is awarded the sum of $1000. On item #10 the evidence supports the position of Pacific that Orton should not have expected that the storm sewer would not have been installed. The evidence supported the balance of Orton's claim in the sum of $6,440. On item #13 the evidence supports the position of Orton but only to the sum of $2000. Orton is awarded the sum of $16,362.83 on the disputed extras in Plat C.

15. Of the payments made by Pacific to Mountainland, $9,922.50 were credited to finance charges and not for materials. Since payments were being made by Pacific, the failure to make timely payments was a risk borne by Pacific and not Orton. The sum of $9,922.50 should not be charged against Orton.

16. Orton asserted a claim for a credit for Mountainland invoices not chargeable to Orton that should be credited back. In its post hearing brief, Orton properly acknowledged that the evidence did not support the claim in general. The Arbitrator finds that since the items were billed to Orton on a regular basis, that Orton had the responsibility to review the bills on a timely basis and bring concerns about differences in pricing to Mountainland at that time and to Pacific before payments were made. The Arbitrator finds that Orton, however, did sustain its burden of proof on items 10 and 11 in the sum of $362.83. The Arbitrator also awards to Orton the cause of action, if any exists, against Mountainland to try to recover any inappropriate overcharges by Mountainland on the listed invoices.

17. Orton asserted a claim for a credit for materials charged by Mountainland to Orton paid for by Pacific. Orton fails in its proof. The evidence was that Orton did the ordering of the materials, received the materials on site and had control of the materials at least until the time that Orton finished its work. If materials were in fact left on site Orton should have made some type of inventory of the same and had it acknowledged by Pacific. Orton bears the risk of loss of material under the circumstances.

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19. Orton claims that it is entitled to a loss of equity in its equipment due to the failure of Pacific to timely make payments for sums due. The loss of equity in equipment is clearly

a consequential damage claim. The law allows for consequential damages only if they were reasonably foreseeable at the time of entering into the contract. The damages are not recoverable if they were not reasonably foreseeable at the time of contracting but were later reasonably foreseeable at the time of the breach of the contract. At the time of entering the contract Orton was only leasing the equipment. During the performance of the contract, Orton exercised its option to purchase the equipment. The claim of the loss of equity in purchased equipment was not reasonably foreseeable at the time of entering into the contract. Orton is therefore not entitled to recover on this claim. The claim is further undermined by the unusually aggressive and unreasonable actions taken by the lender in repossessing and selling the equipment in a commercially unreasonable fashion. The claim is also undermined by Orton's failure to protect its position in bidding at the sale or otherwise mitigating its damages by seeking a stay of the sale or legally challenging the commercially reasonableness of the sale.

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21. Pacific claims that it is entitled to a credit or offset against the claims of Orton on the basis that Orton should have performed, as part of its contract, the work of rough grading of the roadways. The Arbitrator finds that Pacific failed to meet the burden of proof on this issue. To the contrary, the evidence supports Orton's position that rough grading was not included in the contract between Pacific and Orton. The best evidence on this point was the fact that five signed change orders on Plat B were to compensate Orton "as an extra" for stripping and grading work. The scope of the unit prices do not lend themselves to an interpretation that would indicate that grading work was included in any of the unit items. It would not be the norm in the industry to include rough grading in the unit items unless specifically indicated. While there was testimony to that effect from Pacific the Arbitrator cannot find that Pacific met its burden of proof. The Arbitrator notes that Pacific was not entirely consistent its position as to payment for cutting the roadways to rough grade. On the one hand, Pacific wanted the cutting of the roadways to be ancillary to the stated unit price items of work and not to be paid separately. On the other hand, Pacific indicated that Orton was to be paid $1.50/yd for the cutting of the material. Pacific is not entitled to an offset for payments to Carnesecca or Christensen for rough grading work since that work was not part of the Pacific - Orton contract.

22. Pacific claims that it is entitled to a credit or offset to the claims of Orton alleging that Orton used too much imported material. The problem appears to be inherent to the unit price contract that was entered into by the parties. Unit price contracts have advantages and disadvantages. Pacific properly points out that under a unit price contract Orton has no incentive to be judicious in its use of material being paid for by the unit. On the other hand, Pacific only pays for what is actually used. Pacific, however, entered into the unit price type of contract. If Pacific wanted to exercise better control over the useage of material its should have had a representative (typically an engineer) on site to see that

material was being properly used. During the performance of much of the work in Plat B Pacific had such a representative on site. During the performance of work on Plat C Pacific had no such representative on site. The Arbitrator does not find that the evidence supports a finding that Orton wasted material. There was evidence presented by Pacific that more material was used in Plat C than maybe Pacific thought should have been used. Pacific, however, did not meet its burden of proof on that issue. The computations by Fred Clark were general in nature omitting some lengths of pipe installation, assumed that Orton was responsible to cut the road for rough grading, etc.

The award is summarized as follows:

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Total credits due Pacific	($573,632.99)
Other Adjustments:	
Add back finance charges paid to Mountainland	$9,922.50
Add back for materials used on Pacific residences	$362.83
Net amount due Orton	$66,440.24

23. Orton is entitled to interest on the unpaid amounts at the statutory rate of ten percent per annum. The sole reference to 24% interest is found on one change order signed by the representative of Pacific. That single invoice is insufficient to justify an award of interest higher than the statutory rate of ten percent per annum on all of the claims. Interest shall accrue as of May 15, 1995 and shall run until the award is paid.

24. Orton is the prevailing party in this arbitration. Orton prevailed, but obviously not entirely. Orton's counsel is requested to submit an affidavit of attorneys fees and costs within ten days of the date of this Interim Award. Pacific shall have ten days to file an objection to the request for attorneys fees. Orton shall have five days to file a response to the objections filed by Pacific. The arbitrator will then issue a Final Award resolving the issue of attorneys and costs.

The Interim Arbitration Award was issued dated November 7, 1997. Subsequent to the issuance of the Interim Arbitration Award, Orton submitted an affidavit of attorneys fees dated November 12, 1997 and a letter dated December 10, 1997 with further argument about the attorneys fee issue. Pacific submitted an Objection to the Award of Attorneys Fees and a Motion for Reconsideration both dated December 22, 1997. Orton filed an Opposition to Motion for Reconsideration and a Supplemental Affidavit of Attorneys Fees both dated December 23, 1997.

After due consideration of the Motion for Reconsideration and the Objection to Award of Attorneys Fees and the materials filed by each of the parties, the Arbitrator makes these additional rulings:

25. Pacific's Motion for Reconsideration is denied. The Arbitrator heard the arguments during the course of the proceeding that are being reargued by Pacific. Pacific's argument is based largely upon its argument that Orton had within its scope of work the obligation to perform the rough grading of the roadway. The Arbitrator specifically found that the contract did not require that work to be done by Orton. Orton obviously has a duty of good faith and fair dealing with Pacific. The Arbitrator, however, further found that Pacific did not its burden of proof of its allegation that Orton wasted material in Plat C.

26. Pacific's contention that the Arbitrator lacked jurisdiction to hear and determine issues as to Plat B is rejected. Pacific is correct in stating that the arbitration agreement signed on or about June 9, 1997 represented that the issues relating to Plat B had been resolved that the remaining issues to be resolved at the arbitration related to Plat C. In actuality, the parties had not in fact reached an agreement on the Plat B issues. Pacific's assertion in its Motion for Reconsideration that the issues on Plat B had been resolved and were not to be part of the arbitration is not supported by the evidence and material provided to the Arbitrator during the course of the Arbitration. In fact, Pacific submitted its Pre-Arbitration Statement to the Arbitrator dated August 25, 1997 which included as the first document in Exhibit "C" a document entitled "Pacific's Development's Amended Responses to Claims Concerning Plat B". During the course of the proceeding each of

the parties presented evidence on the disputes relating to Plat B. The Parties clearly submitted those issues to the Arbitrator for resolution. The Award as it relates to Plat B is not modified. The Arbitrator also finds that the subcontract agreement required all disputes to be resolved by arbitration which is what the parties have now done.

27. The Arbitrator rules that the subcontract (consistent with UCA 78-27-56.5) provides for an award of attorneys fees to Orton. Pacific breached the subcontract agreement by failing to pay Orton for work performed for Pacific. Further, that as to the mechanics lien on Plat C the applicable statute (UCA 38-1-18) supports an award of attorneys fees on Plat C as well.

28. Orton contends that it is entitled to recover a reasonable attorney's fee for approximately 158 hours for Mr. Bradford at a premium rate of $225/hour rather than the initial billing rate of $125/hour charged by Mr. Bradford. The Arbitrator rejects the claim for a premium rate adjustment. The Arbitrator finds that the rate of $125/hour is a reasonable rate. It is the same rate charged by Mr. Young for a total of approximately 36 hours. The total attorneys at issue amount to $24,200. As the Arbitrator previously found in the Interim Award, Orton did not prevail on all of its claims and issues asserted during the arbitration. After taking into account the success achieved, the complexity of the matter, and other factors as outlined in Dixie Bank the Arbitrator awards the sum of $17,500 in attorneys fees to Orton.

29. Orton incurred costs in the sum of $733.25. No exception was taken to any costs by Pacific. The Arbitrator awards the sum of $733.25 in costs incurred to Orton. The Subcontract agreement indicates that the parties are to bear the costs of their chosen arbitrator. Each party incurred fees to the arbitrator of $2700. The Arbitrator rules that each party is to bear their respective share of the arbitrator fees which are not to be taxed as a "cost."

Dated this 24th day of December, 1997

Robert F. Babcock, Arbitrator

Addendum D

Richard D. Bradford (0421)
BRADFORD, BRADY & JOHNSON
Attorneys for Defendant
389 North University Avenue
Provo, Utah 84601
(801) 374-6272

File No. 0794.04

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

PACIFIC DEVELOPMENT, L.C., a Limited Liability Company, and OTTO BELVEDERE, Plaintiffs,	**CONFIRMATION OF ARBITRATOR'S AWARD AND JUDGMENT**
vs.	
ERIC ORTON dba ORTON EXCAVATION, Defendant.	Civil No. 950400576 Judge Steven L. Hansen Robert Babcock, Arbitrator

Upon Motion of the Defendants, the Court confirms the award made by Arbitrator Robert Babcock. The Court denies the Plaintiffs' Motion to Vacate or Modify Arbitration Award. The Court hereby enters judgment against the Plaintiffs, jointly and severally, as follows:

Principal	$66,440.24
Pre-Judgment Interest at 10% per Annum to 2/18/98	$18,384.83
Attorney's Fees	$20,980.00
Costs	$ 733.50
TOTAL JUDGMENT	**$106,538.57**

Together with interest on the entire judgment, and together with after-accruing attorneys fees as may be shown by affidavit.

DATED this 19 day of February, 1998.

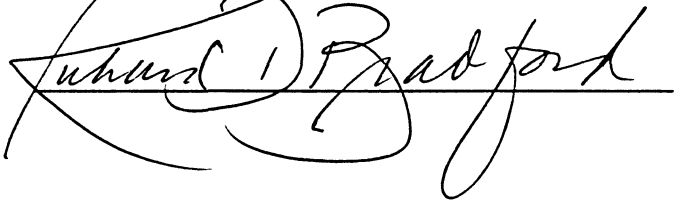
BY THE COURT:

HON. STEVEN L. HANSEN
District Court Judge

CERTIFICATE of SERVICE

On this 17 day of February, 1998, a copy of the *Confirmation of Arbitrator's Award and Judgment* was sent by facsimile transmission to:

Mark E. Arnold
HOLMGREN, ARNOLD & WIGGINS, L.C.
American Plaza II, Suite 404
57 West 200 South
Salt Lake City, Utah 84101
FAX: (801) 328-1151



TRANSMISSION VERIFICATION REPORT

TIME : 02/17/1998 14:32
NAME : BRADFORD BRADY JOHNS
FAX : 8013746282
TEL : 801-374-6272

DATE,TIME	02/17 14:30
FAX NO./NAME	18013281151
DURATION	00:02:02
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MODE	STANDARD